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No. (1)

In The

Supreme Court of the United States

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,
AGENCY CASE NOS. A 97-199-661, 97-199-662,

Petitioners,

vs.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ADRIANA M. B. RIVERA, Pro Se
ANDRES MAURICIO MEJIA VELA, Pro Se
19800 W. Dixie Highway
Lot E C 303
Aventura, FL 33180
(305) 303-6949

QUESTIONS PRESENTED

Introductory statement:

The issue is really whether the ninety (90) days to timely file a Motion to Reopen to the Board of Immigration Appeals from the date of the final order is mandatory and jurisdictional foreclosing any and all equitable tolling, even if for good cause. The Board of Immigration Appeals, (hereinafter BIA) interprets and applies *Abdi v. U.S. Attorney General*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) contrary to its plain meaning and contrary to law, making conclusory statements unsupported by the record, case law precedent, statute or the regulations at 8 C.F.R. Section 1003.2(c)(2), and abusing discretion. The U.S. Court of Appeals for the Eleventh Circuit then affirmed the misguided faulty analysis of the *Abdi* Decision by the BIA, abusing its discretion, that extended without legal justification the ruling in *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) in an In Absentia removal order context. The *Abdi* Decision itself never reached Motions to Reopen in the Ineffective Assistance of Counsel context, and the *Abdi* Court as well as the BIA state in *Abdi* that they do not reach the Ineffective Assistance of Counsel issue. Yet the *Abdi* Court affirms the BIA Decision to deny Petitioner's Motion to Reopen by extending *Abdi* to Motions to Reopen based on Ineffective Assistance of Counsel.

1. Whether the BIA AND U.S. Court of Appeals Decisions affirming that *Abdi v. U.S. Attorney General*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) is a correct and proper application of the law, specifically in finding that the ninety (90) day time period to file a Motion To Reopen is mandatory and jurisdictional, foreclosing any and all equitable tolling regardless of good cause shown, is contrary to law, the plain meaning of the case, case law

QUESTIONS PRESENTED – Continued

precedent in the other ten (10) U.S. Circuit Courts of Appeal, statutes and regulations, and an abuse of discretion.

2. Whether or not the interpretation and application of the *Abdi* Decision of the BIA upheld by the U.S. Court of Appeals for the Eleventh Circuit is contrary to law, and an abuse of discretion, in that it wrongfully extends the *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) analysis in the In Absentia Removal Order/Motion to Reopen context to a Decision based on Ineffective Assistance of Counsel context, contrary to *all* previous legal precedent of the other U.S. Circuit Courts of Appeal, the plain meaning of the *Abdi* Division itself and U.S. Supreme Court ruling in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96; 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990) relied upon by the *Abdi* Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is conferred by INA Section 242, 8 U.S.C. Section 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. Section 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/ Deportation pursuant to INA Section 208(a) and INA Section 241(a)(1)(B). Petitioner filed for Asylum under INA Section 208(a), Withholding of Removal pursuant to INA Section 241(b)(3), 8 U.S.C. Sections 1158 and 1251(b)(3), and for relief pursuant to the Convention Against Torture under 8 C.F.R. Sections 208.16 to .18 and 1208.16 to .18. Venue is proper in this Court because the Proceedings before the Immigration Judge were completed in Miami, Florida which is within this circuit. See INA Section 242(b)(2), (b)(9), 8 U.S.C. Section 1252(b)(2), (b)(9). See *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886 (9th Cir. 2002).

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on 05/22/2007, and a copy of the order denying rehearing appears at Appendix E.

This Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1), 28 U.S.C. Section 2350 and INA Section 242, 8 U.S.C. Section 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See attachment to Table of Cited Authorities (above).

CONSTITUTIONAL ISSUES

1. Fifth Amendment to the U.S. Constitution, Due Process Clause.

2. Fourteenth Amendment to the U.S. Constitution, Due Process and Equal Protection Clauses.

3. Sixth Amendment to the U.S. Constitution, Right to Counsel.

(see attached sheets)

STATEMENT OF THE CASE

Petitioners, Adriana Mercedes Benavides Rivera and her husband, Andres Mauricio Mejia Vela, are both citizens of Colombia who were served with a Notice to Appear (hereinafter NTA) on 12/19/2003 and then filed an Application for Asylum, Withholding of Removal and relief under the Convention Against Torture on Form I-589 on or about 05/05/2003 with the U.S. Citizenship and Immigration Service, and the Miami, Florida Immigration Judge on 06/28/2004, issued an Oral Decision that Denied their claims for relief, following a Notice of Intent to Deny being issued by the C.I.S. on 09/03/2003. On

07/28/2004, Petitioner's previous counsel, Nicolas A. Olano, filed an EOIR-26 Notice of Appeal from a Decision of the Immigration Judge.

On 05/10/2005 the BIA sent a Notice of Briefing Schedule to the parties with Petitioner's Brief being due on 05/31/2005. On 08/12/2005, the BIA issued a Summary Dismissal of Petitioner's case because the record indicated that the appellant did not file such brief or statement, or reasonably explain the failure to do so, within the time set for filing, and dismissed the case accordingly.

On 08/24/2005 Petitioner's former counsel filed a Motion To Reconsider with the BIA, which was Denied by the BIA Order dated 12/06/2005. Petitioners consulted with Mr. Olano in mid-December, 2005. On 01/01/2006, Petitioners consulted with this attorney and retained this attorney to represent them, to file a Motion To Reopen their case pursuant to their Sixth Amendment Right to Counsel and consistent with *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA), *affd*, 857 F.2d 10 (1st Cir. 1988) re an Ineffective Assistance of Counsel Claim, as well as researching other possible remedies.

On 05/12/2006 this attorney filed the Motion To Reopen with the BIA. On 08/03/2006 the BIA issued the Decision Appealed from, Denying Petitioner's Motion To Reopen because the ninety (90) day time period was held to be "mandatory and jurisdictional" which foreclosed equitable tolling. The Eleventh Circuit Court of Appeals issued its Decision per the Entry of Judgment dated 02/28/2007, in effect adopting the BIA interpretation and application of *Abdi*, supra, and denying all requested relief by Petitioner, affirming that the BIA interpretation of *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148 (11th Cir. 2005) that

the ninety (90) day time period to file a Motion To Reopen was "mandatory and jurisdictional" which foreclosed equitable tolling. Petitioner then filed a Petition For Rehearing En Banc Of The Decision of The U.S. Court of Appeals for the Eleventh Circuit on 04/14/2007 that was Denied on 05/22/2007 by Order of the U.S. Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE FACTS

The Decision of the BIA on 08/03/2006, Denied Petitioners Motion to Reopen as untimely because it was filed more than ninety (90) days after Petitioner's learned of the prejudice to their interests by their former counsel, consulted with present counsel on 01/01/2006 and had their claim discussed and analyzed. The BIA wrongly interpreted and applied *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005), holding that the ninety (90) day time period to file a Motion To Reopen is mandatory and jurisdictional pursuant to the *Abdi* ruling, foreclosing all equitable tolling regardless of good cause, a ruling contrary to every other U.S. Circuit Court of Appeal that has addressed the issue. The Motion to Reopen at issue of Petitioners was filed only 132 days after the Petitioners first discovered or became aware of the prejudice they suffered from the conduct of their prior counsel, Mr. Olano, and were advised as to the legal remedies available to them on 01/01/2006; and only 157 days after the BIA Order of 12/06/2005. A Bar Complaint had to be prepared and filed with the Florida Bar as well as requesting a copy of the Petitioner's file from previous counsel which did not arrive at this attorneys office until the end of January, 2006. All of this happened in Hollywood, Florida, about six

(6) miles south of Ft. Lauderdale, Florida, in the aftermath of the direct hit of the eye of Hurricane Wilma through the middle of Broward County, Florida, where Hollywood and Ft. Lauderdale are located. Hurricane Wilma was the worst Hurricane to hit South Florida in Broward County in over 50 years. (Hurricane Andrew struck Miami-Dade County in 1992). We ask the Court to take Judicial Notice of Hurricane Wilma. The BIA wrongly and inappropriately interpreted and applied the ruling by the U.S. Court of Appeals for the Eleventh Circuit in *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005). The Petition for Review was then filed with this Court to review whether the ruling in *Abdi*, supra, is applicable and whether it can withstand judicial scrutiny as good law. The U.S. Court of Appeals for the Eleventh Circuit upheld the BIA interpretation and application of *Abdi*, supra, to the present case pursuant to their Denial Decision of 02/28/2007. Petitioners timely filed a Petition for Review En Banc on 04/14/2007, the Court dismissing same on 05/22/2007.

PROCEEDINGS BELOW

Petitioners were served with a Notice to Appear in Miami Immigration Court on 12/19/2003, filing an I-589, Application for Asylum Withholding of Removal and Relief under the Convention Against Torture on or about 05/05/2003 with the U.S. Citizenship and Immigration Service and, on 06/28/2004, a Denial Decision was issued by the Miami Immigration Judge. On 07/28/2004 a timely Notice of Appeal of the Order of the Miami Immigration Judge was filed with the Board of Immigration Appeals. On 08/12/2005 a Final Order was issued by the Board of Immigration Appeals (hereinafter

BIA), the Decision by the BIA Summarily Dismissing Petitioners' Appeal pursuant to 8 C.F.R. Section 1003.1(d)(2)(i)(E) re Appellant's Appeal Brief being filed untimely. On 08/24/2005, Petitioners' former counsel filed a Motion To Reconsider with the BIA that was Rejected by the BIA on 08/29/2005 because the required filing fee was not submitted. Following submission of an executed and signed Appeal Fee Waiver Request by the lead Petitioner the BIA issued a Filing Receipt For Motion To Reopen or Motion To Reconsider on 09/12/2005. On 12/06/2005 the BIA issued a Decision dismissing prior counsel's Motion To Reconsider the Denial Decision by the BIA dated 08/12/2005. On 05/12/2006 Petitioners' filed a Motion To Reopen with the BIA based on Ineffective Assistance of Counsel and relying on Equitable Tolling due to the impact of Hurricane Wilma on South Florida on 10/24/2005, prior counsels previous conduct, and Petitioners not receiving actual notice of their problem until 01/01/2006 when they consulted with their second counsel.

On 08/03/2006 the BIA issued a Decision dismissing Petitioners' Motion to Reopen as untimely interpreting *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) as requiring *all* Motions to Reopen be filed within ninety (90) days because the ninety (90) day time period is "mandatory and jurisdictional." After a timely Petition for Review of the Decision of the BIA was filed with the U.S. Court of Appeals for the Eleventh Circuit (hereinafater "Eleventh Circuit") the Eleventh Circuit issued its Decision dismissing Petition for Review of a Final Order of the BIA dismissing Petitioners' Motion to Reopen as untimely as the ninety (90) day time period was held to be "mandatory and jurisdictional," pursuant to *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th

Cir. 2005), on 02/28/2007. On 04/14/2007 Petitioners timely filed a Petition for Rehearing En Banc of the Decision of the U.S. Court Of Appeals for the Eleventh Circuit that was Denied 05/22/2007.

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals for the Eleventh Circuit's prior Decision, entered on 02/28/2007, had addressed the Issue of whether or not the Motion to Reopen filed with the Board of Immigration Appeals on 05/12/2006 was untimely pursuant to the ninety (90) day rule which was held to be mandatory and jurisdictional barring equitable tolling, upholding the BIA Decision wrongly interpreting and applying the U.S. Circuit Court of Appeals for the Eleventh Circuit ruling in *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005). See also *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999).

That the Denial of Petitioners Motion to Reopen by the BIA is contrary to law, and an abuse of discretion, in that the Eleventh Circuit Court of Appeals precedent case relied upon by the BIA, *Abdi v. U.S. Atty. Gen*, 430 F.3d 1148, 1149-50 (11th Cir. 2005), and its companion, *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999), are not applicable to the instant case because this case was timely filed by the historical standards of prior and Eleventh Circuit law, within 180 days, actually 132 days after Petitioner's first consultation with this attorney on 01/01/2006 and a total of 157 days after the BIA Order of 12/06/2005 that this Motion To Reopen at issue was filed in response to.

Further, the *Abdi* Decision is dicta insofar as it applies to this case or cases like it because the holding in the case is that the BIA did not arbitrarily or capriciously exercise their discretion in denying the Motion To Reopen in that prior proceeding which was filed well over one year after the Court Order therein.

The Eleventh Circuit ***misinterprets*** the law by trying to apply an analysis from the context of an In Absentia Final Order pursuant to the *Anin* case where Respondent there waited almost two (2) years to file the Motion To Reopen; whereas the present case is in the context of an Ineffective Assistance of Counsel claim that underlies the present Motion To Reopen. The Petitioners have acted diligently, especially in light of Hurricane Wilma and the added procedures imposed by *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The Eleventh Circuit Court analyses in *Abdi* is ***internally inconsistent***, an overreaching of the holding of the case with the Court straining to reach for new law not available based on the facts of the case, the precedent relied upon or the past and present legal precedent that contradicts it, despite the Court wishing it were otherwise.

Petitioner believes that the present Decision dated 02/28/2007 by the Panel of BIRCH, DUBINA and BARKETT, Circuit Judges, is an incorrect interpretation and application of the *Abdi* Decision, See *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1148-50 (11th Cir. 2005). Contrary to the interpretation and application of *Abdi* in the Decision in *Rivera* on 02/28/2007 the Court in *Abdi* simply affirmed that the BIA did not arbitrarily and capriciously Deny the Respondents Motion To Reopen filed almost two (2) years after the disputed Final Order. See page 1149 in

Abdi, supra. The Holding in the *Abdi* case, see Headnote one (1) was the Court Reviewing the Board's Order for abuse of discretion. In Headnote (3) at page 1148 of *Abdi*, supra, it *states*: *"Ninety-day time limit on motions to reopen immigration proceedings may be subject to the doctrine of equitable tolling. 8 C.F.R. Section 1003.2(c)(2)."* And Headnote Four (4) states, or restates the Holding, noting: "Board of Immigration Appeals (BIA's) refusal to reopen appeal from immigration judges removal order, which had been dismissed for alien's failure to file an appellate brief, was not abuse of discretion, despite alien's claim of ineffective counsel, where ninety (90) day time limit for filing motion to reopen *had long since run*. (emphasis added).

The Court first cites a supposed reliance on the U.S. Supreme Court case of *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 111 S.Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990), noting how the *Irwin* Court allowed for equitable tolling but only where the claimant exercised due diligence. *Irwin*, far from supporting the supposed holding in *Abdi* as applied by the BIA, contradicts it.

The Court next turns to the 180-day time limitation for motions to reopen filed pursuant to former INA Section 242B(c)(3)(A), 8 U.S.C. Section 1252b(c)(3)(A) (repealed 1996), for In Absentia deportation orders which could *NOT* be equitably tolled on account of ineffective assistance of counsel. The Court cites *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). This is a false analogy to true ineffective assistance of counsel claims by INNOCENT PETITIONERS who HAVE EXERCISED DUE DILIGENCE under the circumstances. It is a heartless, evil and draconian exercise in the arbitrary exercise of judicial

power totally divorced from the humanitarian and remedial purposes of equitable tolling in cases that merit such.

By Judicial Feat the *Abdi* Court would throw all Motions To Reopen into the Wolf Pit, regardless of whether or not the Petitioners were victims or wrongdoers! This cannot stand! The *Abdi* Court then falsely relies on two (2) points in an attempt to justify this horrible mutation of *Abdi*:

> a) At page 1150 the Court states that it relies on Supreme Court guidance, but does not cite what case because it certainly could not be *Irwin*, stating:
>
> " . . . We stated that pursuant to "the statute's plain language . . . general principles of statutory construction, "and Supreme Court guidance, there were no exceptions to the filing period for motions to reopen. *Id.* at 1279 . . . "
>
> b) Further citing *Anin*, the Court states:
>
> " . . . In reaching our holding in *Anin*, we stated, "***No exceptions have been carved into the . . . filing deadline by federal courts.*** More generally, *no exception to an INA deadline has been found even where an alien acts blamelessly. "Id.* at 1278."

First, the analysis from *Anin* is not appropriate because the statute there deals with In Absentia Orders and the applicants have already failed to appear in court and have a totally different burden of proof because they were given warnings or service of the NTA in most cases.

The Court in *Abdi* would extend the above In Absentia principle to an entirely different kind of applicant – an applicant who is relying in Good Faith on the effective

assistance of his licensed and degreed counsel, who is also an officer of the Court. The Court would have us believe that *NO EXCEPTIONS* have been carved into the filing deadline by the federal courts! In the latter case of innocent victims of Ineffective Assistance of Counsel nothing could be further from the truth. Please reference the case cites set forth below from the following U.S. Circuit Courts of Appeal for the 1st, 2nd, 3rd, 7th, 8th, 9th and 10th Circuits that all recognize the Doctrine of Equitable Tolling in the appropriate cases: (see Petitioner's Opening Brief, pages 10-12 for case summaries). See also *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002).

Equitable Tolling for Ineffective Assistance or Fraud.

1) *Ray V. Gonzales*, 439 F.3d 582, 588-92 (9th Cir. 2006)

2) *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005)

3) *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005)

4) *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002)

5) *Galvez Pineala v. Gonzales*, 427 F.3d 833, 838-39 (10th Cir. 2005)

6) *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005)

7) *Chen v. Gonzales* 415 F.3d 151, 153-54 (1st Cir. 2005)

8) *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005)

9) *Scorteanu v. INS*, 339 F.3d 407, 412-14 (6th Cir. 2003)

10) *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000)

Far from making an all encompassing holding about Motions to Reopen in a case involving review of the BIA's discretion, the Eleventh Circuit QUALIFIES it holding not once, *but twice,* in Footnotes No. 1 and No. 2, noting that the BIA had already determined that the *doctrine of*

equitable tolling did not apply to facts of the case and, secondly, in Footnote No. 2 that the *Court specifically refused to address the issue of ineffective assistance of counsel raised* by Petitioner. See *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1150 at Footnote No. 1 and No. 2 (11th Cir. 2005). (emphasis added).

The Eleventh Circuit in *Abdi* noted above that the FACTS distinguished *Abdi* from an equitable tolling case by stating that Petitioner filed it *long after* the 90 – day deadline." (emphasis added). *Id.*

Since the BIA in their Decision of August 3, 2006 applied *Abdi* incorrectly in light of the above analysis of the Eleventh Circuit holding in *Abdi*, the BIA must be reversed by this Court. The BIA has simply overextended and misapplied the limited ruling in *Abdi*, stating in their Decision:

"The respondents claim that prior counsel was incompetent, because prior counsel failed to file a timely brief with this Board, which caused us to summarily dismiss their appeal. However, the Eleventh Circuit Court of Appeals has stated that the motion to reopen period is "mandatory and jurisdictional," and not subject to equitable tolling. *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1273, 1278 (11th Cir. 2005); see also *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (concerning motion to reopen "in absentia" order)." See *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005).

The BIA even notes how the facts in *Anin* are concerned with an "in absentia order." The Respondents claim Petitioner's are asking this Court to "ignore its own precedent" and that Petitioner's are requesting that the *Abdi* holding be Reversed (. . . only an en banc court can reverse a prior panel decision). This is clearly not the case

as the above makes clear. Petitioner is seeking only to have this Court find that the BIA and U.S. Eleventh Circuit Court of Appeals Decision upholding the BIA interpretation and application of *Abdi* is not correct – that *Abdi* must be limited to the facts and issues the Eleventh Circuit cited in Footnotes No. 1 and No. 2 as well as by citing the *Anin* case – a case involving a different statute and an In Absentia Order the petitioner there sought to reopen.

This is exactly what Petitioner herein seeks – that *Abdi* does *not* apply to a case of ineffective assistance of counsel, especially a meritorious case such as Petitioner's where counsel and Petitioner's were victims of Hurricane Wilma, the worst Hurricane to hit South Florida in 50 years on 10/24/2005.

Consequently, given the limitations by the Eleventh Circuit as noted above in their Decision in *Abdi*, as well as the In Absentia facts in *Anin* versus the Ineffective Assistance of Counsel facts herein, plus the compelling case holdings by most of the other U.S. Circuit Courts of Appeal, this Court is compelled to reverse the Decision of the U.S. Court of Appeals for the Eleventh Circuit issued on 02/28/2007 upholding the Decision of the Board of Immigration Appeals on 08/03/2006, the holding of the Eleventh Circuit Court being as an *incorrect interpretation and application of the law, as well as an abuse of discretion*. See *Wong Wing Hang v. INS*, 360 F.2d 715, 718-719 (2d Cir. 1966), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

CONCLUSION

Based upon the foregoing the Petitioner Adriana Mercedes Benavides Rivera, et al., respectfully requests that this Court Grant Petitioner's Petition for a Writ of Certiorari for the compelling precedent setting reasons set forth above to correct an incorrect interpretation and application of the law and to prevent irreparable harm to countless innocent victims of ineffective assistance of counsel and other circumstances deserving of equitable remedies like every other Circuit Court of Appeals to address this issue in the United States has done, and, Reverse the Decision of the Eleventh Circuit Panel in *Rivera*, entered in the above styled matter and Grant Relief to Petitioners not inconsistent with this Court's Order, including the proper interpretation and application of *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148 (11th Cir. 2005) and any and all other relief the Court deems proper.

Respectfully submitted,

ADRIANA M. B. RIVERA, Pro Se
ANDRES MAURICIO MEJIA VELA, Pro Se
19800 W. Dixie Highway
Lot E C 303
Aventura, FL 33180

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14749
Non-Argument Calendar

Agency Nos. A97-199-661
A97-199-662

Adriana Mercedes Benavides River,
Andres Mauricio Mejia Vela,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondents

Petition for Review of a Decision of the
Board of Immigration Appeals

(Filed Feb. 28, 2007)

Before: BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Petitioners Adrianna Mercedes Benavides Rivera and Andres Mauricio Mejia-Vela, through counsel, petition this court for review of the BIA's final order denying the reopening of an appeal of the IJ's denial of their claims for

asylum, withholding of removal, and CAT relief.[1] The BIA denied the motion to reopen as untimely.

On appeal, Rivera, while acknowledging that the motion to reopen was not filed within ninety days of the BIA's denial of her motion for reconsideration, nevertheless argues that equitable tolling principles should be applied because her counsel was ineffective. Specifically, Rivera argues that her previous counsel failed to file proper and timely motions, and he "misled" her until she later confronted him.

We review the BIA's denial of a motion to reopen for an abuse of discretion. *Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219, 1220 (11th Cir. 2003). "Our review is limited to determining whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious." *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148, 1149 (11th Cir. 2005) (citation and internal quotation marks omitted). One way to show an abuse of discretion is to highlight the application of an incorrect or improper legal standard. *See In re Ford Motor Co.*, 471 F.3d 1233, 1250 (11th Cir. 2006).

"Motions to reopen are disfavored, especially in a removal proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Abdi*, 430 F.3d at 1149 (citation and internal quotation marks omitted). An alien may file one motion to reopen, and that motion "'shall state the new facts that will be proven at a

[1] We refer to the petitioners as "Rivera," because she is the lead petitioner in this case, and Mejia-Vela was only included in the original asylum proceeding as a derivative applicant.

hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.'" *Id.* (quoting INA § 240(c)(7)(A), (B), 8 U.S.C. § 1229a(c)(7)(A), (B)). "A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1) (quoted in *Abdi,* 430 F.3d at 1149).

"A motion to reopen immigration proceedings 'must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.'" *Abdi,* 430 F.3d at 1149 (quoting 8 C.F.R. § 1003.2(c)(2)). "[T]he statutory 90-day period for filing a notice of appeal is mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling." *Id.* at 1150. This is true, even though counsel's deficient performance may have caused the appeal to be untimely filed. *Id.* at 1148-50.

In *Abdi,* an attorney appealed the BIA's order denying a petitioner's claims for relief, but failed to file a timely supporting brief, and so the BIA dismissed the appeal. *Id.* at 1149. Over one year later, the petitioner, represented by different counsel, filed a motion to reopen on the ground that the first attorney was ineffective for failing to file the required supporting brief. *Id.* The BIA denied the motion to reopen, and we affirmed on appeal because the motion was not timely filed. *Id.* at 1149-50.

"Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme

Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001).

Given our controlling precedent in *Abdi*, we conclude that the BIA here did not abuse its discretion in denying the motion to reopen as untimely. Rivera did not file her motion to reopen until May 12, 2006, indisputably more than ninety days after the BIA denied her motion for reconsideration on December 6, 2005.

PETITION DENIED

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood FL 33021

February 28, 2007

RE: 06-14749-II Adriana Mercedes Benavides Rivera v. U.S. Atty. Gen.
AGCY NO.: A97-199-661
CC: Judd Barton James
CC: Regina Byrd
CC: Russell J.E. Verby
CC: David V. Bernal
CC: Administrative File

United States Court of Appeals
for the Eleventh Circuit

No. 06-14749

Agency Nos.
A97-199-661
A97-199-662

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

- - - - - - - - - - - - - - - - - - -

Petition for Review of a Decision of the
Board of Immigration Appeals

- - - - - - - - - - - - - - - - - - -

JUDGMENT

(Filed Feb. 28, 2007)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as judgment of this Court.

Entered: February 28, 2007
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Stamp: ISSUED AS MANDATE
MAY 30 2007
U.S. COURT OF APPEALS
ATLANTA, GA.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Files: A97 199 661 – Miami
A97 199 662

Date: AUG 03 2006

In re: ADRIANA MERCEDES BENAVIDES-RIVERA
ANDRES MAURICIO MEJIA-VELA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Judd James, Esquire

ORDER:

PER CURIAM. We denied the respondents' appeal on August 12, 2005, and denied a motion to reconsider on December 6, 2005. The respondents filed an untimely motion to reopen on May 12, 2006. *See* 8 C.F.R. & 1003.2(c)(2) (motion to reopen must be filed within 90 days of final Board decision). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion, which will be denied.

The respondents claim that prior counsel was incompetent, because prior counsel failed to file a timely brief with this Board, which caused us to summarily dismiss their appeal. However, the Eleventh circuit Court of Appeals has stated that the motion to reopen period is "mandatory and jurisdictional", and not subject to

equitable tolling. *Abdi v. U.S. Atty. Gen.*, 430 F. 3d 1148, 1149-50 (11th Cir. 2005); *see also Anin v. Reno*, 188 F. 3d 1273, 1278 (11th Cir. 1999) (concerning motion to reopen *in absentia* order). In any event, the respondents consulted new counsel on January 1, 2006, where their claim was discussed and analyzed, Respondents' Mot. at ¶ 12, well more than 90 days before the pending motion was filed. The motion to reopen is, therefore, denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FL

A 97-199-661 May 18, 2006

BENAVIDES RIVERA, ADRIANA MERCEDES

TO: Board of Immigration Appeals
Office of the Clerk
P.O. Box 8530
Falls Church, VA 22041

This Record of Proceedings (ROP) is forwarded to the Board of Immigration Appeals for Consideration of the following:

[ ] Appeal of the Immigration Judge decision.

[ ] Appeal of Immigration Judge decision on a motion to reopen.

Please note:

[ ] The respondent/applicant is DETAINED

[ ] Other _____
_____

[ ] This ROP is for an appeal on a decision entered prior to July 1, 1996.

This ROP is being submitted to APU at the following state:

[ ] Notice of Appeal filed. Tapes need to be transcribed.

[ ] IJ has signed decision. Briefing schedule needs to be set.

[ ] Motion for Extension of Time to Extend Briefing Schedule has been submitted

[ ] Briefing Schedule is complete/expired.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

A97 199 661 – Miami
A97 199 662

Date: DEC 06 2005

In re: ADRIANA MERCEDES BENAVIDES RIVERA
ANDRES MAURICIO MEJIA VELA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Nicholas A. Olano, Esquire

APPLICATION: Reconsideration

The case was last before the Board on August 12, 2005, when we summarily dismissed the respondents' appeal for failure to submit an appeal brief pursuant to 8 C.F.R. § 1003.1(d)(2)(i)(E). The respondents have now filed a motion to reconsider our prior decision. The motion to reconsider will be denied.

A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); *see also* 8 C.F.R. § 1003.2(b) (2005). In this case, the respondents assert that they filed a timely appeal brief and, thus, the Board erroneously concluded that the respondents failed to file an appeal brief. In support of their assertion that they did file a brief, the respondents submitted a letter from Philip Senkus of Apollo Express Courier and a copy of an appeal brief

allegedly sent to the Department of Homeland Security (DHS) regarding the respondents' claim for asylum.

A review of the documents reflects that the respondents have failed to establish that the Board's prior decision warrants reconsideration. The letter from Philip Senkus indicates that Apollo Express Courier delivered a brief to the Board of Immigration Appeals on May 31, 2005. However, the letter is particularly vague. It does not indicate the exact date that the respondents' attorney's office, located in Miami, Florida, to the courier service, which located at 8260 Greensboro Drive, Suite 240, McLean, Virginia 22102. More importantly, the letter does not indicate that the brief that was delivered relates to the respondents.

The respondents also submitted a photocopy of their brief that was allegedly filed with the DHS. However, the photocopy does not reflect a date stamp from DHS reflecting the date of receipt of the brief by DHS. At the same time, the Board's records do not reflect that an appeal brief relating to the respondents was filed at the Board before, on, or after May 31, 2005. Moreover, noticeably absent from the evidence submitted in support of the motion to reconsider, is an affidavit from either the respondents' attorney or a staff member attesting to the timely filing of the appeal brief. Therefore, to new legal argument, error or fact, or particular aspect of the case which was overlooked ground upon which to reconsider our previous decision. Accordingly, the respondents' motion to reconsider will be denied.[1]

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[1] It should also be noted that the respondents initially failed to submit the required fee of $110.00 or the Fee Waiver Request Form

(Continued on following page)

ORDER: The respondents' motion to reconsider is denied.

FOR THE BOARD

(Form EOIR-26A). Pursuant to notification by the Office of the Clerk that the motion was defective, the respondents submitted a Form EOIR-26A. While the alleged declaration contained in the Form EOIR-26A is by Adriana M. Benavides, it is not signed by the declarant. Rather, the Form EOIR-26A is signed by the respondents' counsel. Thus, the fee waiver is not in compliance with 8 C.F.R. § 1003.24(d).

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A97-199-661 – Miami Date:AUG 12 2005

In re: MEJIA-VELA, ANDRES MAURICIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Olano, Nicholas A., Esquire

ORDER:

PER CURIAM. The appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1(d)(2)(i)(E). The appellant checked the block on the Notice of Appeal (Form EOIR-26) indicating that a separate written brief or statement would be filed in support of the appeal. This block is immediately followed by a clear warning that the appeal may be subject to summary dismissal if the appellant indicated that such a brief or statement will be filed and, within the time set for filing, fails to file the brief or statement. The appellant was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that the appellant did not file such a brief or statement, or reasonably explain the failure to do so, within the time set for filing. Accordingly,

the appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1(d)(2)(i)(E).

FOR THE BOARD

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14749-II

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,

Petitioners,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

- - - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 22, 2007)

Before: BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)